Supreme Court, U. S.
FILED
SEP 2 1972
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-376

ONE LOT EMERALD CUT STONES AND ONE RING,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	3, 4
STATEMENT	4
REASONS FOR GRANTING THE WRIT	5, 6
ARGUMENT	7
CONCLUSION	8
APPENDIX A	App. 1-9
APPENDIX B	App. 11, 12
APPENDIX C	App. 13-20
APPENDIX D	App. 21, 22

CITATIONS

Case	Page
Ashe v. Swenson, 397 U.S. 436	5, 7
Coffey v. United States, 116 U.S. 436	5, 7
Helvering v. Mitchell, 303 U.S. 391	5, 7
Murphy v. United States, 272 U.S. 630	5
Neaderland v. C.I.R., 424 F.2d 639 (CA2)	5
Rex Trailer Co., Inc. v. United States, 350 U.S. 148	5
United States ex rel. Marcus v. Hess, 317 U.S. 537	5
United States v. Burch, 294 F.2d 1 (CA5)	5
United States v. Gramer, 191 F.2d 741 (CA9)	5
United States v. 1953 *Oldsmobile*, 222 F.2d 668 (CA4)	5

CITATIONS (cont.)

Case	Page
United States v. One Dodge Sedan, 113 F.2d 552 (CA3)	5
United States v. Physic, 175 F.2d 338 (CA2)	5
United States v. Two Hundred And One Fifty-Pound Bags of Furazolidone, 52 F.R.D. 222, ____F.2d____ (CA8, 1971)	5
United States v. 20 Strings Seed Pearls, 34 F.2d 142 (SDNY)	5
United States v. U. S. Coin and Currency, 401 U.S. 715	5, 6, 7
Various Items of Personal Property v. United States, 282 U.S. 577	5

CONSTITUTION AND STATUTES

United States Constitution, Fifth Amendment	2, 6, 7
18 U.S.C. 545	3, 4
19 U.S.C. 1497	4
28 U.S.C. 1254(1)	2

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FRANCISCO FARKAC KLEMENTOVA, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App. A, infra, pp. App. 1) is not yet reported. The opinion of the District Court (App. C, infra, p. App. 13) is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 9, 1972. (App. B, infra, pp. App. 11) The jurisdiction of this Court is invoked pursuant to Title 28 United States Code §1254(1).

QUESTION PRESENTED

I.

WHETHER THE ACQUITTAL OF THE OWNER OF MERCHANDISE ON CRIMINAL CHARGES ALLEGING UNLAWFUL IMPORTATION OF THAT MERCHANDISE INTO THE UNITED STATES, IN VIOLATION OF TITLE 18 UNITED STATES CODE §545, BARS A SUBSEQUENT FORFEITURE PROCEEDING DIRECTED AGAINST THE SAME PROPERTY.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment Five:

". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ."

STATUTORY PROVISIONS INVOLVED

Title 18 United States Code §545

"Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States. . . . ."

Title 19 United States Code §1497

> "Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article."

STATEMENT

On September 8, 1970, the United States commenced a forfeiture action in the United States District Court for the Southern District of Florida, against One Lot Emerald Cut Stones And One Ring seized on June 5, 1969, by Bureau of Customs Agents from the petitioner, Francisco Farkac Klementova. The complaint alleged that the emeralds and ring were brought into the United States by means of a false or fraudulent statement in that the property was not included in a declaration and entry as required by law contrary to the provisions of Title 19 United States Code §1497 and Title 18 United States Code §545; that the seizure of the property was pursuant to Title 18 United States Code §545; and that by reason of the foregoing, particularly Title 18 United States Code §545, the property was forfeited to the United States.

Klementova, as the owner of the emeralds and ring, filed his answer and defended against the forfeiture on the ground that he had been acquitted on the charge of having knowingly and willfully smuggled and clandestinely introduced the emeralds and ring into the United States in violation of Title 18 United States Code §545.

The District Court, primarily relying upon *Coffey v. United States*, 116 U.S. 436, *Ashe v. Swenson*, 397 U.S. 436, and *United States v. U. S. Coin and Currency*, 401 U.S. 715, held that the prior acquittal of the criminal charges constituted a bar to the subsequent forfeiture proceedings. (App. C, infra, pp. App. 13)

The Court of Appeals reversed the District Court and remanded the case for entry of judgment for the United States. (App. A, infra, pp. App. 1)

REASONS FOR GRANTING THE WRIT

1. The decision of the case *sub judice* is *squarely* in conflict with *United States v. Two Hundred And One Fifty-Pound Bags Of Furazolidone*, 52 F.R.D. 222, ____ F.2d ____ (CA8, 1971),[1] certiorari denied, 92 S.Ct. 1168.[2]

2. Subsequent to *Coffey v. United States*, 116 U.S. 436, other decisions[3] of this Court resolving related issues have caused many lower courts to question the continuing vitality of *Coffey*.[4]

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[1]The opinion of the Eighth Circuit has not been published, but is included herein as App. D, pp. 21,22

[2]Chief Justice Burger was of the opinion that the petition should be granted.

[3]*Murphy v. United States*, 272 U.S. 630; *Various Items of Personal Property v. United States*, 282 U.S. 577; *Helvering v. Mitchell*, 303 U.S. 391; *United States ex rel. Marcus v. Hess*, 317 U.S. 537; *Rex Trailer Co., Inc. v. United States*, 350 U.S. 148.

[4]*United States v. 1953 Oldsmobile*, 222 F.2d 668 (CA4); *United States v. One Dodge Sedan*, 113 F.2d 552 (CA3); *United States v. Cramer*, 191 F.2d 741 (CA9); *United States v. 20 Strings Seed Pearls*, 34 F.2d 142 (SDNY); *United States v. Burch*, 294 F.2d 1 (CA5); *United States v. Physic*, 175 F.2d 338 (CA2); *Neaderland v. C.I.R.*, 424 F.2d 639 (CA2).

3. The recent decision of *United States v. U. S. Coin and Currency*, 401 U.S. 715, in part relied upon by the Trial Court herein, raises the important issue of whether or not every forfeiture by its very nature is protected by *all* of the provisions of the Fifth Amendment.

4. The principles of law involved herein, unless decided, will become an even greater and more serious problem for trial courts in the future. Effective October 1, 1972, Rules 7 and 31 of the Federal Rules of Criminal Procedure have been amended to require that all indictments contain the extent of any interest or property subject to *criminal* forfeiture (Rule 7) and that a special verdict be returned concerning that interest (Rule 31).[5] This case will afford the Court an appropriate opportunity to determine what distinction, if any, exists between *civil and criminal* forfeiture and whether *all* forfeitures are punitive (or remedial) and its relationship with Amendment Five of the United States Constitution.

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[5]Some of the problems envisioned by the petitioner are:

1. Must the Trial Court instruct on both reasonable doubt and preponderance of the evidence?
2. If the verdict were not guilty as to both the criminal and forfeiture provisions, could the government then proceed under a different forfeiture statute, such as in the instant case?
3. The probability of inconsistent verdicts as to the crime and the forfeiture.

ARGUMENT

Notwithstanding this Court's clear language in *United States v. U. S. Coin and Currency*, 401 U.S. 715, holding that forfeitures for wrongful acts are punitive, the Fifth Circuit concludes that the forfeiture herein is in aid of the collection of customs duties and, therefore, remedial. Apparently, it does so under the rationale of *Helvering v. Mitchell*, 303 U.S. 391. The Fifth Circuit fails to make the distinction between administrative penalties, as discussed in *Helvering*, and the punitive forfeiture of a person's property. This Court specifically distinguished *Coffey v. United States*, 116 U.S. 436 in the *Helvering* decision.

Under the doctrine of *Ashe v. Swenson*, 397 U. S. 436, collateral estoppel is embodied in the double jeopardy clause of Amendment Five. Klementova having been acquitted of the charges cannot constitutionally be punished, by forfeiting his property, for the same transaction based upon the same evidence and substantially the same offense.

CONCLUSION

In view of the conflict between the Fifth and Eighth Circuits and the other serious questions regarding the nature of forfeiture proceedings, the petition for writ of certiorari should be granted.

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